CONCLUSION

For the foregoing reasons, the judgment below that the president has legal authority to detain Petitioner as an "enemy combatant" based on the facts alleged should be reversed and the case remanded with instructions that the habeas corpus petition be granted and the government be directed to release Petitioner from military custody forthwith.

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Dated: January 21, 2009

REPLY BRIEF

No. 08-368

In the Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI, PETITIONER

v.

DANIEL SPAGONE, UNITED STATES NAVY COMMANDER, CONSOLIDATED NAVAL BRIG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF THE MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO VACATE THE JUDGMENT BELOW AND REMAND WITH DIRECTIONS TO DISMISS THE CASE AS MOOT

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REPLY BRIEF IN SUPPORT OF THE MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO VACATE THE JUDGMENT BELOW AND REMAND WITH DIRECTIONS TO DISMISS THE CASE AS MOOT

Petitioner asks this Court to resolve extremely sensitive constitutional questions in order to render a hypothetical pronouncement that will not affect the legal rights of petitioner or any other person. This Court should decline that suggestion.

Petitioner does not contest that he has received all of the relief that he seeks in his habeas petition, or that upon his transfer, no individuals will remain detained as enemy combatants on United States soil.[1] In these cir-

[1] There have been a total of three individuals detained as enemy combatants on United States' soil during the entirety of the seven-plus

cumstances, petitioner's claim is entirely abstract. The hypothetical possibility of future detention on which petitioner relies is insufficient to prevent this case from being moot. The concerns underlying the mootness doctrine are at their height here, given that highly sensitive and fact-specific constitutional and national security matters are at stake. And, in any event, petitioner does not deny the strong *prudential* arguments counseling against review. See *Padilla* v. *Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in denial of certiorari). Given that petitioner will be able to challenge any future detention should the need arise, there is no need for this Court to decide the seminal constitutional questions raised here without a concrete case before it.

1. Four salient considerations, none of which petitioner answers, militate strongly against further review in this case. First, against the backdrop of a comprehensive review of all detention policies, the President has effected a definitive and fundamental change in the government's treatment of petitioner. The President's February 27, 2009, Memorandum ends the custody that petitioner is challenging and directs that, upon petitioner's transfer to the control of the Attorney General, the authority to hold petitioner in military detention "shall cease." Mot. to Dismiss App. 1a. The Memorandum also unambiguously "supersedes" the June 23, 2003, Memorandum that ordered petitioner detained as an enemy combatant.[2] *Ibid.*

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year period since the September 11, 2001 attacks: petitioner, Jose Padilla, and Yaser Hamdi.

[2] Petitioner takes no position on the government's application to this Court to acknowledge petitioner's transfer to civilian custody. Accordingly, respondent respectfully asks this Court to grant that application.

Second, petitioner will now be subject to a different regime entirely: civilian criminal proceedings. He will have the opportunity to answer the charges against him, and he will be afforded the constitutional protections to which all criminal defendants are entitled.

Third, as a result of petitioner's transfer to civilian custody, he has now received all of the relief that he seeks in his habeas petition. C.A. App. 25 (seeking order "directing Respondent to charge Petitioner with a criminal offense or to release him"). No live controversy remains in this case.

Fourth, in light of the hypothetical nature of this dispute, the Court should refrain from deciding the sensitive constitutional issues presented by petitioner's challenge. It is well-settled that constitutional questions should not "be dealt with abstractly," but should be addressed "only as they are appropriately raised upon a record before" the Court. *Local No. 8-6, Oil Workers Int'l Union* v. *Missouri*, 361 U.S. 363, 370 (1960) (*Local No. 8-6*) (quoting *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Bd.*, 315 U.S. 740, 746 (1942)).

2. a. In light of these considerations, petitioner's reliance on the "voluntary cessation" doctrine is unavailing.[3] As petitioner acknowledges, the purpose of habeas corpus is to obtain release from confinement. Pet. Br. Opp. Mot. to Dismiss 7-8 (Resp.); see *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2266-2267 (2008). Because the President has issued an order that releases petitioner from the custody he challenges as soon as the transfer can be effectuated, and because petitioner does not

[3] Petitioner does not contend that the "capable of repetition but evading review" exception prevents this case from being moot. Cf. Pet. Br. Opp. Mot. to Dismiss 7 n.5

claim that there are any ongoing collateral consequences of his detention, there is no additional relief that a court may order. See *Spencer* v. *Kemna*, 523 U.S. 1, 7-8 (1998); *Picrin-Peron* v. *Rison*, 930 F.2d 773, 775 (9th Cir. 1991) (court had no power to grant relief pursuant to habeas petition after prisoner was released); cf. *Padilla*, 547 U.S. at 1063 (Kennedy, J., concurring in denial of certiorari) ("Even if the Court were to rule in Padilla's favor, his present custody status would be unaffected.").

Indeed, the relief that petitioner now seeks has transmuted itself into something akin more to a declaratory judgment: a ruling that will "give [him] the assurance that he no longer faces the risk of renewed military detention." Resp. 7. But again, the purpose of habeas corpus is to challenge actual present custody, not to provide a vehicle for obtaining a declaration as to the legality of hypothetical future custody. And, indeed, petitioner has never sought such declaratory or injunctive relief. C.A. App. 25. Unlike an ordinary civil case, in which an injunction might be sought to prevent a defendant from resuming a challenged practice in the future, no hypothetical possibility of future detention can prevent petitioner's habeas petition from being moot. Unsurprisingly, petitioner cites no cases from this Court—and the government is aware of none—finding that a habeas case is not moot by application of the voluntary-cessation doctrine when the petitioner already has been released from custody.

b. In any event, petitioner's reliance on the voluntary-cessation doctrine reduces to the unsupported assertion that the government is simply attempting to "avoid review" (Resp. 8) while "preserv[ing] the claimed legal authority to detain [petitioner] as an enemy com-

batant" (Resp. 6) (internal quotation marks omitted). Those allegations cannot overcome the formal determination by the President that petitioner is to be *released* from custody as an enemy combatant in order to face civilian criminal charges against him.[4] See *Commercial Cable Co.* v. *Burleson*, 250 U.S. 360, 362 (1919) (finding challenge to presidential seizure "wholly moot" after President returned seized cable lines, despite asserted "fear that [the cable lines] may again be wrongfully taken"); *Padilla*, 547 U.S. at 1063 (Kennedy, J., concurring in denial of certiorari) (habeas petition rendered "hypothetical" by release from military detention).

Petitioner's assertions (Resp. 5, 6, 8) that the President's revocation of his enemy combatant detention is a temporary diversion intended to frustrate judicial review have no foundation. The government's institution of criminal charges against petitioner is the result of a grand jury finding of probable cause to believe that petitioner committed the crimes for which he has been indicted—a finding that independently supports the validity of the release and transfer. Moreover, these criminal charges are the product of a review directed by the President specifically with respect to petitioner and tremendous efforts by prosecutors and investigators. And that review of petitioner's status has occurred in the context of a comprehensive review of detention policies being undertaken by the Executive Branch. The government's decision to indict, and the President's decision to relinquish military detention so that petitioner shall face those charges, are actions entitled to a "presumption of

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[4] Petitioner correctly notes that the burden of establishing mootness is on the government; but that undisputed proposition (Mot. to Dismiss 9) does not aid petitioner because the government has satisfied that burden.

regularity." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14 (1926)). Indeed, the presumption of regularity should be at its zenith when a formal determination by the President is at stake.

Other circumstances amply support the conclusion that transfer to criminal custody is a meaningful termination of the custody petitioner challenged. Jose Padilla, one of the two other enemy combatants formerly detained on United States soil, was subject to a similar presidential release and transfer—and was tried and incarcerated in the civilian system without ever facing re-designation.[5] And the government's agreement here (Mot. to Dismiss 9 n.4) that vacatur of the decision below would be appropriate conclusively demonstrates that the government is not attempting to preserve its victory while evading review. See *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). Thus, contrary to petitioner's contention (Resp. 4), there is "actual evidence" from experience—in addition to the formal determination by the President of the United States—establishing the legitimacy of the government's action.[6] See *Preiser* v. *Newkirk*, 422 U.S. 395, 402

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[5] Petitioner's assertion (Resp. 7 n.4) that the possibility of future detention will chill his criminal defense is unpersuasive. The criminal proceeding will take place under the supervision of the district court, with the full panoply of constitutional protections available to him, and petitioner will be able to immediately raise any claims relating to alleged violations of his rights.

[6] In contrast, the decisions on which petitioner relies all involved evidence that the defendant would likely resume the challenged conduct. See *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751 (2007) (defendant ceased practice "pending the outcome of this litigation" while "vigorously defend[ing]" its legitimacy); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167,

(1975); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 632 (1979).

Moreover, there is no reasonable expectation that any hypothetical future military detention would arise in the same legal and factual context. Although petitioner suggests (Resp. 4) that the government "speculates" about the circumstances in which it might detain him in military custody in the future, the point is simply that even if petitioner were re-designated, the circumstances would almost certainly be different. In the short term, both the President's review of detention policies and petitioner's criminal proceedings will run their course and will transform the factual setting, both for the government and petitioner. And because the President's Memorandum removes the existing designation of petitioner as an enemy combatant subject to military detention, any future detention—were that hypothetical possibility ever to occur—would require new consideration under then-existing circumstances and procedure. See *Padilla*, 547 U.S. at 1063 (Kennedy, J., concurring in denial of certiorari) ("consideration of what rights [Padilla] might be able to assert" in the future would be speculative).

3. Petitioner invites the Court (Resp. 9) to issue what amounts to an advisory opinion "dispell[ing] once and for all" "the prospect of further military detention." Tellingly, however, petitioner has no answer to the powerful equitable and prudential concerns that counsel strongly against review here. Petitioner agrees (Resp.

176-178, 193 (2000) (finding issue of fact as to resumption of conduct where defendant had history of manipulative litigation practices); *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 222-223 (2000) (defendant granted plaintiff the relief it sought, but in a patently invalid manner that was unlikely to be upheld).

10) that this case implicates "elemental constitutional concerns," but he points to no occasion on which this Court reached out to decide a case that would not affect the petitioner *or any other individual.*[7] Indeed, the Court has repeatedly declined to do just that. See, *e.g.*, *Local No. 8-6*, 361 U.S. at 396; *Kremens* v. *Bartley*, 431 U.S. 119, 133 (1977).

Nor can petitioner explain why his challenge must proceed now, despite its hypothetical nature, when any future detention could be "addressed if the necessity arises," in a manner that ensures that "the office and purposes of the writ of habeas corpus are not compromised." *Padilla*, 547 U.S. at 1063-1064 (Kennedy, J., concurring in denial of certiorari) (describing trial-court protections and original writ of habeas corpus). Neither petitioner's preference for prospective judicial habeas review (Resp. 8 n.6), nor the length of the past military detention from which he is now to be released (Resp. 8), can displace the equitable limitations of the writ or the caution that is called for in this sensitive area where national security policy and the Constitution intersect. In similar situations, this Court has acted on its prudential concerns by dismissing the writ. See *Medellin* v. *Dretke*, 544 U.S. 660, 666-667 (2005) (in light of possible relief in state courts, "it would be unwise to reach and resolve" difficult questions).

Finally, this Court has often recognized that a court may "forgo the exercise of its habeas corpus power," *Munaf* v. *Geren*, 128 S. Ct. 2207, 2220 (2008) (quoting

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[7] Contrary to petitioner's suggestion (Resp. 8-9), *Friends of the Earth*, 528 U.S. at 191-192, and *Pacific Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, No. 07-512 (Feb. 25, 2009), slip op. 7, did not indicate that judicial resource concerns would ever cause the Court to decide constitutional questions unnecessarily.

Francis v. *Henderson*, 425 U.S. 536, 539 (1976)) when confronted with a case that is not one "in which [that power] ought to be exercised," *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830) (Marshall, C.J.); see 28 U.S.C. 2241(a) (providing that writ "*may* be granted" (emphasis added)). The Court has therefore refrained from exercising its habeas jurisdiction where prudential concerns—such as interference with foreign affairs or national security—counsel against entertaining the writ. See *Munaf*, 128 S. Ct. at 2221. Here, even if petitioner's case were not moot for Article III purposes, compelling prudential concerns militate against exercising habeas jurisdiction to decide complex constitutional questions in a hypothetical posture. This Court should therefore dismiss the writ of certiorari in its equitable discretion (or vacate the judgment and remand with directions to dismiss, see 28 U.S.C. 2106) even if it does not conclude that the case is moot.

* * * * *

The writ of certiorari should be dismissed. In the alternative, the judgment below should be vacated and the case remanded with directions to dismiss the habeas corpus action as moot, or in the exercise of equitable discretion.

Respectfully submitted.

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Acting Solicitor General

MARCH 2009

AMICUS CURIAE BRIEF

118 27 B647

No. 08-368

Supreme Court, U.S.
FILED
JAN 28 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,
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v.

COMMANDER DANIEL SPAGONE, U.S.N.,
CONSOLIDATED NAVAL BRIG.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association (the "ABA") respectfully submits this brief as *amicus curiae*. The ABA is the largest

[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and such consents are on file with the Clerk of this Court.

voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

The ABA offers a unique perspective on the issue now before the Court, which is whether an individual lawfully within the United States may be detained by the United States military and held indefinitely without charge or trial. As the national voice of the legal profession, the ABA has a special interest in and responsibility for protecting the rights guaranteed by the Constitution, safeguarding the integrity of our legal system, and fostering the growth of the rule of law, both at home and abroad. Indeed, the ABA's Constitution states, in pertinent part, "The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government."[3] Further, over its one hundred year-plus history, the ABA has developed special competence in the area of protection of the rights of persons deprived of their liberty by arrest or detention.

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to its filing.

[3] ABA Constitution available at www.abanet.org/polcy /constitution_and _bylaws.pdf.

Based on studies conducted by its task forces and resolutions adopted by its policy-making body, the ABA believes that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military detention unless through constitutionally permissible means, which must include the opportunity for prompt and meaningful judicial review, effective assistance of counsel, and only if any detention thereafter is pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures.

SUMMARY OF ARGUMENT

The September 11, 2001 terrorist attack on the United States has resulted in a profound struggle to balance the protection of the people with each person's individual rights. After careful study, and based on the experiences and judgment of a broad range of legal practitioners, the ABA has formulated policies that it believes strike the appropriate balance for these times. The ABA also has urged Congress and the Executive Branch to consider how any proposed legislation and policy regarding detention of "enemy combatants" may affect the response of other nations to future acts of terrorism and to the efforts of the United States in promoting the rule of law.

At the heart of the ABA policies is the conclusion that—while the present threats warrant greater security—the due process principles upon which this nation was founded must be preserved. It is the ABA's position that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military deten-

tion unless such persons are given the opportunity for prompt meaningful judicial review. This review must include meaningful access to, and effective assistance of, counsel. Also, any resulting detention can be permissible only if pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures. The ABA believes that this commitment to due process is essential to the preservation of our core principles of liberty at home and to our leadership role in promoting the rule of law globally, even in exigent circumstances.

ARGUMENT

OUR CONSTITUTIONALLY GUARANTEED CRIMINAL DUE PROCESS RIGHTS, EVEN IN GRAVE TIMES, MAY NOT BE ABROGATED EXCEPT THROUGH CONSTITUTIONALLY PERMISSIBLE MEANS.

For over two hundred years, whenever this nation has been confronted by war, our government has struggled to achieve a proper balance between the protection of the people and each person's individual rights. After the September 11, 2001 attack, Congress and the President were forced to take unprecedented steps to ensure the safety of this nation and of innocents worldwide. While recognizing the government's responsibility to work to prevent another attack on our nation, ABA asserts that this country must also be vigilant in defining those lines that cannot be crossed. As our national experience has taught us:

> [W]e must be on constant guard against excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties.

> * * * And we must ever keep in mind that "the Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.

Duncan v. Kahanamoku, 327 U.S 304, 335 (1946) (Murphy, J. concurring) (quoting *Ex parte Milligan,* 71 U.S. 2, 120-21 (1866)).

The ABA believes that the methods employed in the cause of national security, even in grave times, must comply with constitutionally permissible statutory law and policy, and with international law to which the United States is a signatory. As this Court stated, "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which make[] the defense of the Nation worthwhile." *United States v. Robel,* 389 U.S. 258, 264 (1967).

Accordingly, the ABA, through its members and appointed Task Forces, has studied the Acts of Congress and the implementing orders of the Executive that have resulted from the September 11, 2001 attack. Based on the experiences and judgment of a broad range of legal practitioners, the ABA has adopted policies[4] that it believes strike the appropri-

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[4] The ABA's policymaking body is its House of Delegates, which is comprised of more than 500 delegates. Reports that recommend the adoption of specific policy positions may be submitted by ABA delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members and the Attorney General of the United States, among others. The full House votes on the recommendations and those that are approved become ABA

ate balance between national security needs and the preservation of our fundamental freedoms, as well as the preservation of the constitutionally established balance of powers among our branches of government.

At the heart of the ABA's policies is the conclusion that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military detention unless such persons are given the opportunity for prompt meaningful judicial review, with meaningful access to, and effective assistance of, counsel, and only if any detention thereafter is pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures.

In February 2002, five months after the September 11, 2001 terrorist attack, the ABA voiced concern about the military order titled, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." This order was issued by President Bush, assertedly pursuant to his authority as President and Commander in Chief under the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224 ("AUMF").

After careful study, the ABA adopted a policy specifically urging that the President and Congress assure that neither this military order, nor any similar military order that might be issued, would be deemed applicable to United States citizens, lawful resident aliens, and other persons lawfully present in the

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policy. *See* ABA Leadership, House of Delegates - General Information, *available at* http://www.abanet.org/leadership/delegates.html.

United States.[5] The ABA did so because the military order authorized military commissions that, in the

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[5] *Revised Recommendation 8C* (adopted Feb. 2002). *Available at* http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf. The policy urged that "the President and Congress should assure that the law and regulations governing any tribunal will:

1. Not be applicable to United States citizens, lawful resident aliens, and other persons lawfully present in the United States;
2. Not be applicable to persons apprehended or to be tried in the United States, except for persons subject to the settled and traditional law of war who engage in conduct alleged to be in violation of such law of war;

* * *

4. Not permit indefinite pretrial detention of persons subject to the order;
5. Require that its procedures for trials and appeals be governed by the Uniform Code of Military Justice except Article 32 and provide the rights afforded in courts-martial thereunder, including but not limited to provision for certiorari review by the Supreme Court of the United States (in addition to the right to petition for a writ of habeas corpus), the presumption of innocence, proof beyond a reasonable doubt, and unanimous verdicts in capital cases; and
6. Require compliance with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights, including, but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of ex post facto application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances.

ABA's opinion, would not satisfy constitutional minimum guarantees and would entail substantially fewer protections than those required for trials conducted in federal district court or under the Uniform Code of Military Justice.[6]

Concerned that constitutional safeguards were not being properly considered in connection with other military orders and actions taken by the Executive, the ABA formed a Task Force on Treatment of Enemy Combatants in March 2002. This Task Force was charged with examining the constitutional, statutory, and international law and policy questions raised by the detention of "enemy combatants." In February 2003, the Task Force submitted its resolutions and report to the ABA House of Delegates, after having circulated them in preliminary form to ABA members, working groups from the ABA's Criminal Justice Section and the Section of Individual Rights and Responsibilities, and the Congress and the Executive. The resolutions, which were adopted as ABA policy in February 2003, focused on the safeguards that should

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The policy also urged the "Executive and Legislative branches, in establishing and implementing procedures and selecting venues for trial by military tribunals, to give full consideration to the impact of its choices as precedents in (a) the prosecution of the U.S. citizens in other nations and (b) the use of international legal norms in shaping other nations' responses to future acts of terrorism." *Id.*

[6] *See,* Report in support of Resolution 8C. Available from the ABA. Although only the resolutions submitted to the House of Delegates may be adopted as policy of the ABA, their accompanying reports are considered by the House in determining whether to approve the resolutions as ABA policies. These reports must be approved by the sponsoring entity and must contain the reasons for the proposed resolutions. ABA Constitution and Bylaws, Article 45.2(3) and (6) (2008-2009).

be employed when the government designates and detains, as "enemy combatants," United States citizens or other persons lawfully present in the United States.[7]

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[7] Task Force on Treatment of Enemy Combatants, *Revised Recommendation* 109 (adopted Feb. 10, 2003). *Available at* http://www.abanet.org/leadership/recommendations03/109.pdf The policy, which was co-sponsored by the ABA's Criminal Justice Section, the Section of Individual Rights and Responsibilities, the Senior Lawyers Division, the Section of Litigation, the General Practice, Solo and Small Firm Section, and the Section of Administrative Law and Regulatory Practice, reads:

> **RESOLVED**, That the American Bar Association urges that U.S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainee and the requirements of national security; and
>
> **FURTHER RESOLVED**, That the American Bar Association urges U.S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" not be denied access to counsel in connection with the opportunity for such review, subject to appropriate conditions as may be set by the court to accommodate the needs of the detainees and the requirements of national security; and
>
> **FURTHER RESOLVED**, That the American Bar Association urges Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of the U.S. citizens, residents, or others who are detained within the United States as "enemy combatants;" and
>
> **FURTHER RESOLVED**, That the American Bar Association urges that, in setting and executing national policy regarding detention of "enemy combatants," Congress and the Executive Branch should consider how the policy

In its accompanying report,[8] the Task Force noted that the cases of Yaser Hamdi and Jose Padilla, both United States citizens, were then proceeding through the courts. The Task Force concluded that these cases raised troublesome and profound issues, especially in light of the observation by the United States Court of Appeals for the Fourth Circuit that the government had taken the position that "with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi v. Rumsfeld,* 296 F.3d 278, 283 (4th Cir. 2002). The Task Force noted that the Executive had maintained that its power to detain "enemy combatants" indefinitely without bringing criminal charges derived from Supreme Court precedent, in particular, *Ex parte Quirin,* 317 U.S. 1 (1942), and from the laws of war.

The Task Force noted, however, that the *Quirin* defendants were able to seek review and were represented by counsel. Further, the question for decision had been whether their detention for trial by Military Commission was "in conformity with the laws and Constitution of the United States." *Quirin,* 317 U.S. at 18. Since the *Quirin* Court had held that these enemy aliens—who were not lawfully within the United States—were entitled to judicial review, the Task Force concluded that the same entitlement could not be denied to United States citizens and other persons lawfully present in the United States, especially when held without charges.

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adopted by the United States may affect the response of other nations to further acts of terrorism.

[8] Resolution and Report 109 (adopted Feb. 2003). Available from the ABA.

Specifically as to the AUMF, the Task Force concluded that neither the AUMF nor any laws enacted in response to terrorist attacks expressly authorized detention of United States citizens as "enemy combatants." Further, 18 U.S.C. § 4001(a) raised serious questions about using the AUMF in support of such detentions.[9] The Congressional House Report accompanying the legislation that became Section 4001(a) stated that the purpose of the bill was "to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists" and to repeal the Emergency Detention Act of 1950 ("EDA"). *See* H.R. Rep. No. 92-116, at 1435 (1971). The EDA had been enacted at the beginning of the Korean War and had authorized the establishment of domestic detention camps to hold, during internal security emergencies, individuals deemed likely to engage in espionage or sabotage. *Id.* at 1435-36. The House Report noted that "the constitutional validity of the Detention Act was subject to grave challenge because it allowed for detention merely if there was reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." *Id.* at 1438.

The Task Force concluded that, if the AUMF is nevertheless interpreted as authorizing detentions of "enemy combatants" including United States citizens and others lawfully present in the United States, standards for detention must be established and judicial review must be required to determine, with ap-

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[9] 18 U.S.C. § 4001(a) states: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

propriate deference to the President's determination, whether the detention meets those standards.

However, the Task Force noted, appropriate deference does not mean that the courts may not review Executive determinations as to the scope of its authorization. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587 (1952) (executive order taking possession of private property was not sustained as exercise of President's military power as Commander in Chief, even though "theater of war" was an expanding concept). Courts have preserved their role in reviewing Executive detentions even in times of war. *See, e.g., Robel,* 407 U.S. at 318-19 ("The standard of judicial inquiry must also recognize that the 'concept' of 'national defense' cannot be deemed an end in itself, justifying an exercise of [executive] power designed to promote such a goal"). *See also, In re Yamashita,* 327 U.S. 1, 8 (1946) ("The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner").

Based on this analysis, the Task Force concluded that "enemy combatants" who were citizens or lawfully within the United States, and who had not been charged with a crime or a violation of the law of war, must be afforded a prompt opportunity for meaningful judicial review of the legal basis for their detention. This review, further, must include the right to effective assistance of counsel, since the right to judicial review could well be meaningless if detainees were not afforded effective assistance of counsel in challenging their detention.

The Task Force also noted that legislation was required that would establish constitutionally acceptable standards and procedures under which a court

could determine whether continued detention was permissible. This was necessary because, in the Task Force's opinion, the AUMF and, accordingly, Section 4001(a), were applicable to detentions of United States citizens and others lawfully present in the United States as "enemy combatants." *Compare, Hamdi,* 542 U.S. 507, 519 (2004) (Congress "clearly and unmistakably" authorized detention under the AUMF "in the narrow circumstances considered here" of an armed Taliban soldier captured in combat).

Certainly Congressional silence has never been sufficient to authorize military jurisdiction over civilians seized while legally within the United States. *See, e.g., Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (in authorizing "martial law" under Hawaiian Organic Act, Congress did not authorize supplanting of courts by military tribunals); *Milligan*, 71 U.S. at 136-37 (Chase, C.J., concurring) (where provisions of act contemplated no trial or sentence other than by civil court, trial by military commission could not be asserted). If the Executive is to be authorized to assert military jurisdiction over citizens or persons lawfully present in the United States and to dispense with their constitutionally guaranteed criminal due process rights, then Congress must say so and fixed procedures governing such jurisdiction must be in place. As stated in the ABA policy:

> "FURTHER RESOLVED, That the American Bar Association urges Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of U.S. citizens, residents and others who are detained within the United States as "enemy combatants."

Finally, the Task Force concluded that, in setting and executing national policy regarding citizens and other persons lawfully present in the United States who are detained as "enemy combatants," both Congress and the Executive should consider how that policy may affect the response of other nations to future acts of terrorism. The Task Force noted that international agreements and principles recognized by the United States, which include the Universal Declaration of Human Rights[10] and the International Covenant on Civil and Political Rights,[11] support the protection of individuals from arbitrary detention and guarantee a meaningful review of a detainee's status. These and other international human rights treaties, conventions and jurisprudence are the result, in sub-

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[10] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) available at http//www.un.org /Overview/rights.html. Article 8 declares that everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution of by law. Article 9 provides that no one shall be subjected to arbitrary arrest, detention or exile. For the role of the United States in the drafting and adoption of the Universal Declaration, *see* Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

[11] International Covenant on Civil and Political Rights, available at http//unhchr.ch/html/menu3/b/a_ccpr.htm. Article 9 provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." Article 14 describes standards and procedures that should be used in all courts and tribunals. Article 15(1) provides, *inter alia*, that no person shall be held guilty of a criminal offense that does not constitute a criminal offense under national or international law. Articles 14 and 15(1) are referenced in ABA Policy 8C, which is quoted in n. 5, *infra*.

stantial part, of the leadership of the United States and its efforts to promote the rule of law.

The ABA also notes that, throughout the world, constitutions and rules of criminal procedure reflect the United States' influence and leadership in promoting the rule of law. The ABA has played a role in those efforts, especially through its Rule of Law Initiative. This Initiative assists countries, including the former Soviet republics and countries in Europe, Eurasia, Asia, Africa, the Middle East and Latin America, to develop and implement legal reforms and respect for the rule of law.[12] The training programs that the ABA conducts for attorneys and judges in these countries help to ensure the growing force of the rule of law.[13]

Reaffirmation of the rights of U.S. citizens and legal residents to access to the courts encourages the adoption of the rule of law, solidifies our relations with other nations, and works to protect our country and the world from terrorism. The denial of the protection of judicial process to those declared to be "enemy combatants" undermines these important goals. As Lord Peter Goldsmith, then Attorney General of the United Kingdom, stated in a speech to the ABA House of Delegates, the threat of terrorism "does not mean that we have an unlimited license to throw away our values for the sake of expediency"; rather the rule of law requires "subjecting executive action

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[12] *See* About the ABA Rule of Law Initiative, *available at* http://www.abanet.org/rol/about.shtml.

[13] *See* Judicial Reform Programs, *available at* http://www.abanet.org/rol/programs/judicial-reform.html and Legal Profession Reform Programs, *available at* http://www.abanet.org/rol/programs/legal-profession.html (describing the ABA's international training programs for judges and attorneys).

to the scrutiny of the democratic institutions and also of the courts, for judicial scrutiny is a key part of the rule of law."[14]

CONCLUSION

The American Bar Association, as amicus curiae, respectfully requests that this Court hold that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military detention unless such persons are given the opportunity for prompt meaningful judicial review, with meaningful access to, and effective assistance of, counsel for such review, and only if any detention thereafter is pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures.

Respectfully submitted,

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[14] American Bar Association: Lord Peter Goldsmith, Attorney General United Kingdom Addresses House of Delegates (speech delivered Feb. 12, 2007), *available at* http://www.abavideonews.rog/ABA404/av.php#rss.

AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
JAN 2 8 2009
OFFICE OF THE CLERK

No. 08-368

IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York ("ABCNY") is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, ABCNY educates the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees.

ABCNY believes that the federal system of civilian courts is well-equipped to try individuals such as petitioner who are accused of terrorist activities after being arrested within the United States. ABCNY is deeply concerned about the novel and far-reaching theory of military detention upheld by a bare five-judge majority of the *en banc* Fourth Circuit, which represents a departure from our Nation's longstanding ideals and traditions. ABCNY submits this brief to present this Court with additional information about the capacity of the federal justice system to handle criminal cases against individuals suspected of complicity in terrorism.[1]

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[1] All parties have consented to this filing. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than five and a half years ago, petitioner was wrested from the criminal justice system and transferred into military custody in South Carolina, where he remains today. As was the case when Jose Padilla was taken into military custody, petitioner's confinement at the Naval Consolidated Brig in South Carolina raises fundamental legal questions and has spawned conflicting lower-court rulings. An obvious alternative to the military detention of petitioner would be to prosecute him in the criminal justice system—as was ultimately done with Padilla. Below, however, the members of the *en banc* Fourth Circuit disagreed regarding the capability of the civilian justice system to handle terrorism cases such as that of petitioner.

Expressing no qualms about the capacity of the criminal justice system, the Fourth Circuit plurality would have ordered that the writ be granted and that the government proceed with a criminal prosecution of petitioner if it wishes to detain him for a significant period of time. Pet. App. 9a (Motz, J., concurring in judgment). In his separate opinion, however, Judge Wilkinson asserted that "prosecutions of terrorist suspects have frequently proven to be difficult, both as a practical and logistical matter and as a broader gauge of what the judiciary's proper role should be on matters touching quite intimately on the conduct of war." *Id.*, at 220a. Although he acknowledged that the justice system "retains an important place in our constitutional system when handling the terrorist threat" (*id.*, at 207a), Judge Wil-

kinson recited a series of alleged flaws and deficiencies in the capacity of the federal courts to handle terrorism cases. *Id.*, at 211a-216a. Judge Wilkinson argued that Congress was conscious of these alleged inadequacies and that, as a result, it must have intended the AUMF to authorize the military detention of persons such as petitioner whose prosecution, according to Judge Wilkinson's analysis, would be difficult or impossible in federal court. *Id.*, at 216a.

The legislative history surrounding the adoption of the AUMF, however, contains no evidence that Congress considered the adequacy of the criminal justice system as a means of prosecuting alleged terrorists, such as petitioner, who are arrested within the United States. Nor is there any evidence in the legislative history that Congress considered authorizing military detention as an alternative to criminal charge and trial in such circumstances. As petitioner shows, such a departure from our Nation's traditions and precedents raises serious constitutional questions and would require at least a clear statement from Congress.

Further, and contrary to the views of Judge Wilkinson, ABCNY strongly believes that our existing legal system is capable of handling such prosecutions. Indeed, a large body of data from the past two decades demonstrates that terrorism prosecutions in the federal courts have overall led to just, reliable results without security breaches or other problems that threaten our Nation's safety. The need for, or wisdom of, a domestic preventive detention scheme as an alternative to the criminal justice system is a subject of intense public debate. Apart from implicating legal issues, that debate raises issues of policy that

Congress is best suited to resolve. It is implausible that Congress did so in silence and without discussion.

In this brief, we discuss the available data regarding terrorism prosecutions in federal court and describe:

- The broad range of substantive statutes that are available to prosecutors in terrorism cases, see *infra*, at I.B.1;
- The multiple sources of authority, under settled law, to detain suspected terrorists within the civilian justice system, see *infra*, at I.B.2;
- The demonstrated ability of judges and lawyers to preserve the confidentiality of classified information while ensuring fair trials, see *infra*, at I.B.3;
- The practical approaches to evidentiary issues that have been followed in terrorism cases, see *infra*, at I.B.4;
- The tools to protect the safety and security of the participants in the criminal justice system and the public at large, see *infra*, at I.B.5; and
- The ability of prosecutors to develop reliable intelligence information by debriefing cooperating defendants, see *infra*, at 1.B.6.

In our discussion, we point out the many ways in which petitioner's own criminal case—up until the time that he was suddenly removed from civilian custody—illustrates the effectiveness and capability of the justice system.

Of course, this does not mean that the criminal justice system, by itself, is "the answer" to the prob-

lem of international terrorism. ABCNY recognizes that the government must use all lawfully available tools to address the threat that terrorism poses to our Nation. Nevertheless, as the plurality concluded below, if the government wishes to detain petitioner for an extended period of time, he is entitled to the protections of the criminal justice system. Moreover, an extensive body of evidence demonstrates that the criminal justice system has effectively handled terrorism prosecutions.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE CONCLUSION THAT THE CRIMINAL JUSTICE SYSTEM IS CAPABLE OF EFFECTIVELY HANDLING TERRORISM CASES

In recent years, many observers have expressed views on the capability of the criminal justice system to handle terrorism cases. Some commentators have argued for novel authority to indefinitely detain terrorism suspects who may not be subject to traditional law-of-war detention but who, it is claimed, cannot prudently be afforded the protections enjoyed by criminal defendants. See, *e.g.*, Michael B. Mukasey, Op-Ed, *Jose Padilla Makes Bad Law*, Wall St. J., Aug. 22, 2007, at A15; Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists' Court*, N.Y. Times, July 11, 2007, at A19; Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (Penguin Press 2008). Others, including ABCNY, have expressed confidence in the ability of the criminal justice system to handle terrorism cases and have been skeptical about novel claims of authority to de-

tain or try accused terrorists. See Ass'n of the Bar of the City of N.Y., Comm. on Fed. Courts, *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror* (Feb. 6, 2004);[2] Kelly Anne Moore, Op-Ed, *Take Al Qaeda to Court*, N.Y. Times, Aug. 21, 2007; David H. Laufman, *Terror Trials Work: Yes, Mr. Mukasey, Courts Can Handle National Security Cases*, Legal Times, Nov. 5, 2007, at 58-59.

In May 2008, two of the authors of this brief prepared *In Pursuit of Justice*, an assessment of the capability of the criminal justice system to handle terrorism cases. See Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008).[3] *In Pursuit of Justice* concluded that while the federal courts are certainly not perfect, and while terrorism cases can present significant challenges, "the criminal justice system is reasonably well-equipped to handle most international terrorism cases." *In Pursuit of Justice*, at 2. In the eight months since *In Pursuit of Justice* was released, new developments in terrorism cases have only reinforced the central thesis of the paper. The following discussion draws heavily on *In Pursuit of Justice* and also, at times, incorporates a discussion of petitioner's own aborted criminal case.

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[2] http://www.abcny.org/pdf/report/1C_WL06!.pdf

[3] www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf

A. The Methodology And Data Underlying Our Empirical Analysis Of Terrorism Cases

Assessing the capability of the criminal justice system in terrorism cases need not be—and in our view should not be—a theoretical or academic exercise, nor should it be skewed by assertions of speculative benefits or hypothetical problems with civilian court prosecutions. Instead, the discussion should be based on actual experience. Over the years, and especially since the early 1990s, the government has brought scores of actual prosecutions in federal court against defendants alleged to be complicit in terrorism. These cases provide a rich set of data that is useful in assessing the adequacy of the justice system.

By any standard, the roster of completed terrorism cases is impressive. It encompasses prosecutions brought before 9/11 against Ramzi Yousef, the mastermind of the first World Trade Center bombing; Sheikh Omar Abdel Rahman, the blind Egyptian cleric who plotted to destroy tunnels and other landmarks in New York City; Wadih el-Hage and other conspirators responsible for the horrific bombings of the U.S. embassies in Kenya and Tanzania in 1998; and Ahmed Ressam, the so-called "Millennium Bomber," who planned to detonate a bomb at Los Angeles International Airport. In the years since 9/11, the government has successfully prosecuted additional high-profile terrorism defendants in federal court, including Zacarias Moussaoui, who was at one time believed to be the "20th Hijacker"; Jose Padilla, the former Chicago gang member and al Qaeda adherent; Richard Reid, the "Shoe Bomber"; John

Walker Lindh, the "American Taliban"; and numerous defendants involved in providing financial or other support for Islamist terrorism.

In Pursuit of Justice examined these and many other terrorism cases and presented statistics about federal-court prosecutions relating to Islamist terrorism in the years since 9/11. The authors identified prosecutions that the Department of Justice or the popular media stated were related to terrorism, consulted lists of terrorism prosecutions compiled by various organizations, and searched electronic collections of federal docket information for indictments charging terrorism offenses. *In Pursuit of Justice,* at 22-23. They looked not only at cases brought under specific terrorism statutes but also at those based on "alternative charges" such as credit card fraud or immigration violations, so long as some aspect of the public record alleged a link to terrorism. *Id.*, at 22. Using these data-collection methods, the paper identified 107 terrorism cases brought between September 2001 and December 2007 charging a total of 257 defendants. *Id.*, at 23, 26.

The statistics on the 257 defendants reveal a system that is well-equipped to detain, convict, and sentence those who are guilty of crimes relating to terrorism. The conviction rate was high—some 91% of defendants were convicted of at least one offense. *Id.*, at 26. About 70% of defendants were held without bail. *Id.*, at 24, 29. Of the 124 defendants in the paper's data set who were convicted and sentenced, 111 were sentenced to some term of imprisonment. *Id.*, at 26. Excluding the five persons who were sentenced to life imprisonment, the average term of im-

prisonment for the other 106 defendants was 100.71 months, or 8.39 years. *Ibid.*

In the eight months since *In Pursuit of Justice* was published, the courts have continued to render judgments in terrorism cases. For example, the Second Circuit recently upheld the convictions of the Embassy Bombers in three unanimous opinions spanning 125 pages. See *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 549 F.3d 146 (CA2 2008); *In re Terrorist Bombings of U.S. Embassies in E. Africa (Fifth Amendment Challenges)*, 548 F.3d 237 (CA2 2008); *In re Terrorist Bombings of U.S. Embassies in E. Africa (Fourth Amendment Challenges)*, 548 F.3d 276 (CA2 2008). In August 2008, a Fourth Circuit panel including Judges Wilkinson and Motz upheld the conviction of Ahmed Omar Abu Ali, a native of Virginia who trained with al Qaeda in Saudi Arabia and who was arrested and interrogated by Saudi authorities before being turned over to the U.S. government for prosecution. See *United States* v. *Abu Ali*, 528 F.3d 210 (CA4 2008). And after a prior trial ended in a hung jury, the government secured guilty verdicts in the *Holy Land Foundation* terrorism-finance case in the Northern District of Texas. See Jury Verdict, *United States* v. *Holy Land Found. for Relief & Dev.*, No. 04-cr-240-P (N.D. Tex. Nov. 24, 2008) (Dkt. No. 1250) ("*Holy Land* Jury Verdict").

B. The Criminal Justice System Has Consistently Exhibited Both The Vitality And The Adaptability To Effectively Handle Terrorism Cases

1. Existing criminal statutes proscribe a broad range of potential terrorist conduct

The robust capability of the criminal justice system to deal with terrorism cases begins with "the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 547 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in judgment). Of the criminal statutes enacted specifically to combat terrorism, the most oft-used since 9/11 have been the "material support" statutes codified at 18 U.S.C. §§ 2339A and 2339B. See *In Pursuit of Justice*, at 32 (noting that §§ 2239A or 2339B have been charged in almost half of the post-9/11 terrorism cases). Section 2339A, enacted in response to the 1993 World Trade Center bombing, makes it a crime to provide material support with the knowledge or intent that it will be used to further any of a number of specified terrorism-related offenses. 18 U.S.C. § 2339A(a). Meanwhile, § 2339B prohibits material support to any "foreign terrorist organization" if the defendant knows that the organization engages in terrorist activity or has been designated as a foreign terrorist organization. 18 U.S.C. § 2339B(a)(1).

Courts have interpreted "material support" expansively to include a broad range of conduct abetting terrorists. See, *e.g.*, *United States* v. *Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007) (providing medical services constitutes material support); *United States* v. *Sattar*, 395 F. Supp. 2d 79, 100 (S.D.N.Y. 2005) (conveying messages between terrorists constitutes material support). And prosecutors have taken advantage of the broad scope of these statutes to preempt terrorist attacks by arresting defendants at the early stages of their plotting. See, *e.g.*, Second Superseding Indictment, *United States* v. *Hayat*, No. 05-

cr-240 ("*Hayat* Proceedings") (E.D. Cal. Jan. 26, 2006) (Dkt. No. 162) & Verdict, *Hayat* Proceedings (Apr. 25, 2006) (Dkt. No. 331) (defendant traveled to Pakistan to receive "jihadist training" but was indicted before he could "wage violent jihad against the United States"); Superseding Information & Plea Agreements, *United States* v. *Ahmed*, No. 07-cr-647 ("*Ahmed* Proceedings") (N.D. Ohio Jan. 15, 2009) (Dkt. Nos. 129, 132, 133) (defendants arrested before they could travel overseas to kill U.S. soldiers as described in U.S. Dep't of Justice, Press Release, *Chicago Cousins Plead Guilty to Conspiracy to Provide Material Support to Terrorists* ("Ahmed Press Release"));[4] *United States* v. *Goba*, 220 F. Supp. 2d 182, 218 (W.D.N.Y. 2002) (defendants who trained in al Qaeda camp held on evidence suggesting that, *inter alia*, they were "plan[ning] attack upon Americans"). Section 2339B has also been used to cut off suspected channels of support to terrorist groups. See, *e.g.*, *United States* v. *Paracha*, No. 03-cr-1197, 2006 WL 12768, at *1-2 (S.D.N.Y. Jan. 3, 2006) (describing charges against defendant for laundering money and for obtaining immigration documents for known al Qaeda member); *Holy Land* Jury Verdict (convicting defendants under § 2332B for providing financial support to Hamas, a designated foreign terrorist organization).

Other federal criminal statutes designed to thwart terrorism are found in Chapter 113B of the Criminal Code, entitled "Terrorism." For example,

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[4] http://www.usdoj.gov/opa/pr/2009/January/09-nsd-041.html

prosecutors used 18 U.S.C. § 2332, which prohibits serious attacks on U.S. nationals abroad, to convict Richard Reid, a/k/a the "Shoe Bomber." See Judgment, *United States* v. *Reid*, No. 02-cr-10013 (D. Mass. Jan. 31, 2003) (Dkt. No. 188). Another statute relied upon by the government is 18 U.S.C. § 2332b, which prohibits serious attacks "transcending national boundaries" and was invoked against Zacarias Moussaoui. See Judgment, *United States* v. *Moussaoui*, No. 01-cr-455 (E.D. Va. May 4, 2006) (Dkt. No. 1854). Finally, in a case arising from a plot to bomb the subway station at 34th Street in Manhattan, the government won a conviction under 18 U.S.C. § 2332f, which prohibits the delivery, placement, discharge or detonation of an explosive or other lethal device on public property with the intent to cause death, serious injury or major economic loss. See *United States* v. *Siraj*, 468 F. Supp. 2d 408, 413-14 (E.D.N.Y. 2007).

Prosecutors have also charged alternative, readily provable crimes that do not require any proof that the defendant is linked to terrorism or violent crime.[5]

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[5] In addition, prosecutors frequently charge terrorists with violating generally-applicable statutes that criminalize violent conduct such as racketeering, aircraft piracy, arms dealing, and murder. See, *e.g.*, Judgment, *United States* v. *Abu Ali*, No. 05-cr-53 (E.D. Va. Apr. 17, 2006) (Dkt. No. 397) (30-year prison sentence for, inter alia, conspiracy to commit aircraft piracy and conspiracy to destroy an aircraft); Judgment, *United States* v. *Arnaout*, No. 02-cr-892 (N.D. Ill. Aug. 18, 2003) (Dkt. No. 213) (136-month prison sentence for racketeering). Many terrorism prosecutions have also included conspiracy charges. See *In Pursuit of Justice* at 54-56 (discussing application of conspiracy statutes in terrorism cases).

The DOJ has publicly embraced this strategy and has touted the use against terrorism defendants of statutes criminalizing immigration violations (18 U.S.C. § 1425), false statements (18 U.S.C. § 1001), and fraudulently obtaining travel documents (18 U.S.C. § 1546). U.S. Dep't of Justice, *2006 Counterterrorism White Paper* 29 (2006) ("DOJ Counterterrorism White Paper"). Charging such "alternative statutes" can offer numerous advantages in a particular case. For example, it may permit the government to arrest and detain individuals at an early stage, thus helping to prevent violent acts, and it can avoid the necessity of offering sensitive evidence or publicly revealing that an individual has been linked to terrorism, permitting investigations and intelligence-gathering to continue without risk of exposure. See *ibid.*; see also *In Pursuit of Justice*, at 51-54 (citing various authorities).

Petitioner's aborted criminal case provides an object lesson in the utility of charging "alternative statutes" against suspected terrorists. The government initially charged petitioner with a single count of access device fraud under 18 U.S.C. § 1029(a)(3). See Indictment at 1, *United States* v. *al-Marri*, No. 02-cr-147 ("*al-Marri I* Proceedings") (S.D.N.Y. Feb. 6, 2002) (Dkt. No. 4). This charge allowed prosecutors to successfully seek petitioner's pre-trial detention while affording time to develop the case further. The government subsequently obtained a second indictment that charged six counts: two counts of making false statements to the FBI under 18 U.S.C. § 1001(a)(1) and (2); three counts of making false statements to FDIC-insured banks under 18 U.S.C. § 1014; and one count of identity theft under 18 U.S.C. § 1028(a)(7). See Indictment, *United States* v. *al-Marri*, No. 03-cr-

94 ("*al-Marri II* Proceedings") (S.D.N.Y. Jan. 22, 2003) (Dkt. No. 5). These charges, all of which remained pending at the time petitioner was transferred into military custody, resulted in petitioner's continued pre-trial detention in New York and then Illinois. From the public record, there is little reason to doubt the strength of the evidence against petitioner or the viability of the charges against him. Indeed, his trial was only one month away when petitioner was whisked into military detention. See Scheduling Order, *United States* v. *al-Marri*, No. 03-cr-10044 ("*al-Marri III* Proceedings") (C.D. Ill. May 29, 2003) (Dkt. No. 7) (setting trial for July 21, 2003).

2. The criminal justice system has the capability to detain and incapacitate suspected terrorists

One of the proffered weaknesses of the justice system, and the justifications for military detention of alleged al Qaeda adherents like petitioner, is that the justice system does not have the tools to sufficiently incapacitate terrorists. Indeed, Judge Wilkinson's opinion all but assumed that the justice system has no viable means of detaining al-Marri and other suspects. See Pet. App. 210a-11a (criticizing reliance on justice system because "a *failure* to incapacitate individuals such as al-Marri may have dramatic consequences") (emphasis added). But Judge Wilkinson's assumption does not take account of the significant tools available to prosecutors, under settled law,

to arrest and detain dangerous individuals suspected of complicity in terrorism.[6]

First and foremost, when a defendant is charged with a federal crime, the government can seek to detain him on grounds that he presents a risk of flight or a danger to the community, and if the defendant is charged with a terrorism offense, the Bail Reform Act contains a legislatively mandated presumption that the defendant should be detained pending trial. See 18 U.S.C. § 3142(a), (e)(3)(B)-(C). Many terrorism defendants have been detained (see *In Pursuit of Justice*, at 24 (presenting data on bail decisions in terrorism cases)), and case law permits prolonged pre-trial detention if necessary (see *United States* v. *el-Hage*, 213 F.3d 74, 77-81 (CA2 2000) (approving pretrial detention anticipated to last between 30 and 33 months in Embassy Bombing case)). Indeed, petitioner himself was held without bail for approximately 18 months despite being charged with crimes such as identity theft and false statements to banks. See Ord. of Detention Pending Trial, *al-Marri I* Proceedings (Mar. 22, 2002) (Dkt. No. 6); Ord. of Detention Pending Trial, *al-Marri III* Proceedings (May. 29, 2002) (Dkt. No. 8).

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[6] In addition, under certain circumstances the law of war permits the government to capture and detain enemy combatants "to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518 (2004) (opinion of O'Connor, J.); see also *ibid.* ("detention of individuals" who fought against the United States in Afghanistan as part of the Taliban is a "fundamental and accepted . . . incident to war" and may extend "for the duration of the particular conflict in which they were captured").

Upon conviction, defendants convicted of terrorism offenses are often subject to lengthy periods of incarceration. Terrorism statutes carry heavy maximum penalties, and the Sentencing Guidelines recommend significant penalties for terrorism-related crimes. See, *e.g.*, 18 U.S.C. § 2332b(c) (capital punishment available where death results, otherwise life or 25-, 30- or 35-year sentences available for various acts of terrorism transcending national boundaries); 18 U.S.C. §§ 2339A(a) & 2339B(a)(1) (life sentence available where death results, otherwise 15-year sentence available for material support); see U.S.S.G. § 3A1.4 (minimum offense level of 32 and criminal history category of VI for terrorism-related crimes, resulting a minimum recommendation of 210-262 months under U.S.S.G. Ch. 5, Pt. A). In practice, these provisions often translate into lengthy sentences for defendants who are convicted in terrorism cases. See *In Pursuit of Justice*, at 26 (presenting sentencing data).

Petitioner's own case illustrates the availability of substantial sentences in terrorism cases. Had the government successfully prosecuted petitioner on the Illinois charges, he would have been exposed to a maximum penalty of 146 years in prison: 10 years for access device fraud (see 18 U.S.C. § 1029(a)(3) & (c)(1)(A)(i)); 8 years for each of two counts of making false statements to the FBI (see 18 U.S.C. § 1001(a)); 30 years for each of three counts of making false statements to FDIC-insured banks (see 18 U.S.C. § 1014); and 30 years for one count of identity theft (see 18 U.S.C. § 1028(a)(7) & (b)(4)). The Declaration of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism ("Rapp Declaration") asserts that petitioner's criminal conduct was "in

preparation for acts of international terrorism" (Resp. App. 19a), indicating that petitioner would have faced a recommended sentence of at least 210-262 months under the Sentencing Guidelines. See also Pet. for Cert. 3 n.1 (noting that § 3A1.4 would apply at sentencing). Of course, the sentencing court could lawfully have imposed a more severe (or more lenient) sentence than the one recommended by the Guidelines.

Aliens suspected of terrorist activity are subject to a second means of incapacitation—arrest and detention by the Attorney General pending removal proceedings. See 8 U.S.C. § 1226(a). Immigration detentions are either mandatory or subject to the unreviewable discretion of the Attorney General, depending on the immigration charges. See generally 8 U.S.C. § 1226. In cases of suspected terrorism, the government has often used immigration detention to complement its authority to detain under the criminal law. Zacarias Moussaoui, for example, was initially detained before 9/11 for overstaying his visa (see Nat'l Comm'n on Terrorist Attacks Upon the U.S., *The 9/11 Commission Report* at 273 (2004)), and the government can use immigration detention as a "backstop" when the bail statute would otherwise require a defendant's release. Compare Minute Entry, *United States* v. *al-Shannaq*, No. 02-cr-319 (D. Md. July 11, 2002) (releasing defendant Rasmi Subhi Salah al-Shannaq before trial) with Warren P. Strobel & Cassio Furtado, *3 in Visa Plot Have Hijack*

Links, Miami Herald, July 11, 2002, at 3A (al-Shannaq detained on immigration charges).[7]

Finally, in situations where the government cannot file criminal or immigration charges, it can invoke the material witness statute, 18 U.S.C. § 3144, to detain a potential witness for a limited time pending his testimony. Although the material witness statute may be used for only a limited period of time and imposes numerous procedural safeguards—including prompt and continuing judicial review and the appointment of counsel—it is an effective tool for the government in appropriate situations. See Serrin Turner & Stephen J. Schulhofer, Brennan Ctr. for Justice at N.Y.U. Sch. of L., *The Secrecy Problem in Terrorism Trials* 38 (2005); *United States* v. *Awadallah*, 349 F.3d 42, 45-48 (CA2 2003) (upholding perjury indictment of man detained as material witness after his phone number was found in a 9/11 hijacker's vehicle). Indeed, petitioner himself was originally arrested on a material witness warrant and was detained on that basis for approximately two months. See Pet. App. 12a-13a.

3. The criminal justice system adequately protects the secrecy of classified information

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[7] In addition, under Sections 411 and 412 of the USA Patriot Act, Congress authorized the arrest and detention of aliens believed to be connected to terrorism where no charges have been filed, but the statute requires the government to commence removal proceedings or to file criminal charges within seven days after arrest. See 8 U.S.C. §§ 1226a(a).

In his opinion below, Judge Wilkinson also expressed another, commonly leveled criticism of the justice system—that it is not "responsive to the executive's legitimate need to protect sensitive information." Pet. App. 215a. But as Judge Gregory explained in his concurrence, Judge Wilkinson and his fellow critics have given short shrift to "the statutory framework Congress created for handling classified material in a judicial setting, the Classified Information Procedures Act ('CIPA')." *Id.*, at 144a; see also *id.*, at 153a-55a (explaining how CIPA principles could be applied to govern al-Marri's proceedings).

CIPA establishes procedures that allow judges and cleared counsel to determine, before trial, how to manage classified evidence so that the defendant receives a fair trial while secret information is protected. See 18 U.S.C. app. 3; see also *In Pursuit of Justice*, at 82-84 (summarizing CIPA's provisions). Since the late 1980s, when the statute was first used in the terrorism context, courts have applied CIPA in a large number of terrorism cases, and we have found no documented evidence of serious breaches when CIPA procedures have been invoked. See *In Pursuit of Justice*, at 8-9 (summarizing findings); *id.*, at 84-86 (collecting cases).

Importantly, CIPA is neither exhaustive nor exclusive with respect to the use of classified testimony. Indeed, Congress's express intent in enacting CIPA was that district judges "'must be relied on to fashion creative and fair solutions to these problems,' *i.e.*, the problems raised by the use of classified information in trials." *United States* v. *Rosen*, 520 F. Supp. 2d 786, 788 (E.D. Va. 2007) (quoting S. Rep. 96-283, reprinted in 1980 U.S.C.C.A.N. 4294). In Moussaoui's

case, for example, the court faced the novel question of how to apply CIPA to a *pro se* defendant, and concluded that where CIPA would direct information to be disclosed to defense counsel but not the defendant, a *pro se* defendant would receive standby counsel to review the classified materials. See *United States* v. *Moussaoui*, No. 01-cr-455-A, 2002 WL 1987964, at *1 (E.D. Va. Aug. 23, 2002). Similarly, courts have permitted witnesses whose identity is secret to be referred to by a pseudonym, or to testify using a mask or some other method to shield the witness's identity. See, *e.g.*, *United States* v. *Moussaoui*, 382 F.3d 453, 480 n.37 (CA2 2004) (in order to protect national security, district court could allow the use of "alternate names for people or places" in creating substitutions for certain witnesses' proposed testimony).

In his opinion below, Judge Wilkinson deemed CIPA insufficient to protect classified information because judges "will fail to appreciate the broader dangers associated with a potentially sensitive piece of information." Pet. App. 218a. However, Judge Wilkinson's hypothesis is unsupported by evidence and ignores the government's role, under CIPA, in apprising the court of the risks posed by disclosure of classified evidence. In fact, under CIPA, the government can prevent the disclosure of classified information, though it runs the risk of sanctions if an acceptable substitute cannot be found. See 18 U.S.C. app. 3 § 6(e).

Judge Wilkinson's opinion also raised fears about the possibility of leaks, focusing in particular on two alleged examples of security breaches in terrorism cases. As set forth below, however, we believe the first such incident simply did not happen, and the

second does not illustrate flaws in CIPA, since CIPA's procedures were not even invoked.

The first incident cited by Judge Wilkinson supposedly occurred "during the criminal trial of Ramzi Yousef, [when] 'an apparently innocuous bit of testimony in a public courtroom about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communications links had been compromised.'" Pet. App. 218a-19a (quoting Mukasey, *supra*); see also *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2295 (2008) (Scalia, J., dissenting) (referring to same anecdote). However, public-record information does not support the claim that this incident occurred, and based on our review of the record, we believe that it did not. Instead, it seems likely that the report of the incident has become garbled and that the "innocuous bit of testimony" actually occurred in the Embassy Bombings trial in March 2001 rather than in either of the Ramzi Yousef trials in 1996 and 1997. See Trial Tr. at 5292-94, *United States* v. *el-Hage*, No. 98-cr-1023 ("*el-Hage* Proceedings") (S.D.N.Y. May 1, 2001) (Dkt. No. 600) (government's closing argument discussing delivery of satellite phone battery pack to Bin Laden in May 1998). However, the evidence in the Embassy Bombings trial about the delivery of a satellite phone battery to Bin Laden could not have tipped off anyone that the phone was being monitored because the phone had already been inactive for almost two and a

half years when the government offered evidence about it at trial.[8]

The other example of a security breach cited by Judge Wilkinson is that "'in the course of prosecuting Omar Abdel Rahman . . . the government was compelled . . . to turn over a list of unindicted co-conspirators [including Osama bin Laden] to the defendants,'" and that within ten days, that list "was in bin Laden's hands, 'letting him know that his connection to that case had been discovered.'" Pet. App. 214a (quoting Mukasey, *supra*) (second ellipsis in opinion); see also *Boumediene*, 128 S. Ct., at 2295 (Scalia, J., dissenting) (recounting same report). Although the dissemination of the co-conspirators list did occur, it cannot fairly be used to criticize the effectiveness of CIPA because there is no indication that the government sought to invoke CIPA, or even a protective order, to restrict disclosure of the list. See *In Pursuit of Justice*, at 88. Had the government sought a court order sealing the list or prohibiting review by the defendants or anyone not working on the defense team, perhaps the list would not have reached Bin Laden.

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[8] Phone records received in evidence show that the phone's use dropped off in late August and September 1998, after the embassy bombings in East Africa and the U.S. cruise missile attack on Bin Laden, and that the phone went dead entirely on October 9, 1998. See Trial Tr. at 3035 & Gov't Ex. 594, *el-Hage* Proceedings (Mar. 20, 2001) (Dkt. No. 605) (testimony of witness from phone company; phone records). Yet the phone records were not offered in evidence until March 20, 2001. See *ibid.*; see also *In Pursuit of Justice* at 88-89.

In fact, in later terrorism cases, protective orders and other measures have been employed to restrict the dissemination of sensitive materials. For example, during petitioner's pre-trial detention, the government obtained a protective order limiting the release of sensitive information while charges were pending against him in the Southern District of New York. See Protective Order, *al-Marri II* Proceedings (Mar. 24, 2003) (Dkt. No. 9). Petitioner was also placed in a Special Housing Unit that limited his ability to communicate with the outside world for the duration of the New York proceedings. Once petitioner was moved to Illinois, the government imposed Special Administrative Measures, or "SAMs," that severely restricted his contact with the outside world.

In sum, there is "no indication that [CIPA], reasonably interpreted by federal judges, is inadequate to the task of protecting national security interests while affording defendants a fair trial." Ass'n of the Bar of the City of N.Y., *Indefinite Detention*, at 143. That is not to say, of course, that CIPA or judges are foolproof, but the risk of error does not support an argument that courts are inherently susceptible to security breaches.

4. The criminal justice system has displayed a practical and common-sense approach to evidentiary rules in terrorism cases

In his opinion below, Judge Wilkinson also criticized the justice system for imposing evidentiary strictures that are too rigid to allow for the kind of evidence that is available to prosecute terrorists. See, *e.g.*, Pet. App. 211a-12a ("The 'fog of war' creates confusion, and . . . it is often difficult to respect the evidentiary standards . . . that are the hallmarks of

criminal trials"). Judge Wilkinson identified two evidentiary problems as being particularly problematic in terrorism trials: the chain-of-custody requirement and securing witnesses for in-court testimony. *Ibid.* However, Judge Wilkinson cited no actual examples where evidentiary problems have proved insurmountable in terrorism cases.

In fact, many terrorism prosecutions present no unusual evidentiary problems. In petitioner's case, for example, a review of the Rapp Declaration and the criminal docket suggests that the principal evidence against petitioner was composed of emails and other data found in petitioner's computer; papers and other personal effects seized after a search of petitioner's home; phone records, financial and other banking records; records of business transactions; federal immigration records; and the defendant's statements to the FBI. See Resp. App. 9a-15a; Compl., *al-Marri III* Proceedings (May 1, 2003) (Dkt. No. 1) ("Ill. Compl."). These are bread-and-butter pieces of evidence whose admission would not seem to present any special difficulty.[9]

Further, experience shows that both of the specific evidentiary issues cited by Judge Wilkinson have

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[9] While his case was pending in the Southern District of New York, petitioner moved to suppress the physical evidence recovered by the government in searches of his home and automobile. See Suppression Motion, *al-Marri I* Proceedings (June 25, 2002) (Dkt. No. 16). After holding an evidentiary hearing, however, the district court denied petitioner's motion to suppress on grounds that he had consented to the searches. See Decision and Order, *al-Marri I* Proceedings (Nov. 12, 2002) (Dkt. No. 30).

proved to be surmountable. For example, in *United States* v. *al-Moayad*, a terrorist-financing case in the Eastern District of New York, the prosecution rebutted the defendant's entrapment defense by submitting into evidence what "appeared to be an application form for a mujahidin training camp" that listed the defendant as a reference. 545 F.3d 139, 156 (CA2 2008). The government "authenticated the form through the testimony of FBI Special Agent Jennifer Hale Keenan," who testified that it was among a number of items she received, while she was stationed in Pakistan, from American officials in Afghanistan who had in turn seized those items from an al Qaeda training facility. *Ibid.* Although the Second Circuit reversed al-Moayad's conviction based on other trial errors, it found that Hale Keenan's testimony sufficiently authenticated the mujahidin form, even though she simply described "the process of receiving, inventorying, and shipping the documents to Washington D.C." *Id.*, at 156, 172-73 (noting that the "bar for authentication of evidence is not particularly high"); see also Peter Whoriskey, *Defense Cites Ambiguities in Evidence Against Padilla*, Wash. Post, May 19, 2007, at A06 (describing trial court's acceptance of alleged al Qaeda training camp application into evidence).

The Fourth Circuit's recent *Abu Ali* opinion offers a good example of the manner in which courts can overcome problems with witness availability. See *Abu Ali*, 528 F.3d, at 238-42. Two of the witnesses against Abu Ali were Saudi government agents who had interrogated Abu Ali and obtained confessions, but who were not authorized to travel to the United States. *Id.*, at 238-40. The trial court allowed Abu Ali's attorneys to depose the Saudi agents via a two-

way video link subject to procedural protections, including: (1) the presence of attorneys for both parties in Saudi Arabia, along with a translator; (2) real-time transcription of the depositions; and (3) frequent breaks during which Abu Ali was able to communicate with his counsel in Saudi Arabia via cell phone. *Id.*, at 239-40. The Fourth Circuit found that the trial court's protections satisfied Abu Ali's Sixth Amendment Confrontation Clause rights. *Id.*, at 240-42.

Courts and prosecutors have also been able to obtain the presence of active-duty U.S. military personnel when necessary. In *al-Moayad*, the FBI agent who conducted much of the investigation was recalled to testify at trial in Brooklyn, even though at the time of trial he was on active duty in Iraq as a Marine captain where he was stationed in the so-called "Triangle of Death." *In Pursuit of Justice*, at 109; John H. Richardson, *Brian Murphy v. The Bad Guys*, Esquire, Feb. 26, 2007. Similarly, in the case of John Walker Lindh, active-duty military personnel, including Special Forces officers, were ready, willing, and able to testify at John Walker Lindh's suppression hearing; their testimony was not necessary in light of Lindh's guilty plea shortly before the hearing was to commence. See *In Pursuit of Justice*, at 109.

5. The criminal justice system adequately protects the safety and security of both its participants and the public at large

Judge Wilkinson also expressed doubts about the justice system's ability to provide safety and security for trial participants and for the public at large (see Pet. App. 214a-15a), but he cited no specific examples of security breakdowns. Although safety in the

courtroom can indeed be a serious concern, experience suggests little reason to conclude that terrorism cases present courtroom security risks that are not manageable. Indeed, many of the most serious security breakdowns have occurred following non-terrorism-related civil or criminal litigation. See *In Pursuit of Justice*, at 121-22 (citing examples).

In appropriate cases, judges and security officials can invoke a series of extra precautions to maintain safety, including extra metal detectors and court security officers, physical restraints on defendants, and anonymous juries. See *Holbrook* v. *Flynn*, 475 U.S. 560, 570-72 (1986) (additional, uniformed officers did not prevent fair trial); *Illinois* v. *Allen*, 397 U.S. 337, 343-44 (1970) (authorizing physical restraints in extreme cases); *United States* v. *Wong*, 40 F.3d 1347, 1376 (CA2 1994) (approving use of anonymous juries in appropriate cases and subject to reasonable precautions to minimize prejudice to the defendant). Witnesses, in turn, can be protected through a variety of measures including the U.S. Marshals Service's Witness Security Program, which since 1971 has successfully protected, relocated, and given new identities to over 8,000 at-risk witnesses (and their families); indeed, no participant following the program's security guidelines has ever been harmed, and an 89% conviction rate has been achieved in cases where protected witnesses testified. See U.S. Marshals Service, *Witness Security Program Fact Sheet* (Dec. 3,

2007);[10] U.S. Marshals Service, Website, *Witness Security*.[11]

Judge Wilkinson's opinion also raised a separate kind of security concern—that "[t]error suspects may use the bully pulpit of a criminal trial in an attempt to recruit others to their cause." Pet. App. 214a. However, we are not aware of any factual basis for this concern or any discernible propaganda benefit conferred upon terrorists or their causes by court trials. To the contrary, the Executive's refusal to use the justice system in some terrorism cases—along with the use of extrajudicial mechanisms such as detention at Guantanamo and military tribunals—has apparently been the real propaganda bonanza for al Qaeda and other terrorist groups.

Finally, the government can impose SAMs, which aim to prevent inmates from sending communications to persons outside the prison system that may create a risk of violence or terrorism. See 28 C.F.R. § 501.3(a). SAMs may include housing a prisoner in administrative segregation, as well as denying privileges such as "correspondence, visiting, interviews with representatives of the news media, and use of the telephone." *Ibid.* SAMs have been imposed during pre-trial detention in a number of terrorism cases. See, *e.g.*, *United States* v. *el-Hage*, 213 F.3d 74, 78, 81-82 (CA2 2000). Petitioner, too, was subject to SAMs after his transfer to federal custody in Illinois. Indeed, his counsel was preparing to litigate the SAMs when petitioner was transferred into mili-

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[10] http://www.usmarshals.gov/duties/factsheets/witsec.pdf

[11] http://www.usmarshals.gov/duties/witsec.htm

tary custody. See Letter from Pet'r's Counsel to Gov't (June 4, 2003) (attached as Ex. 5 to Pet. for *Habeas Corpus, al-Marri* v. *Bush*, No. 03-cv-1220 (C.D. Ill. July 8, 2003) ("July 8 *Habeas* Pet.")); see also July 8 *Habeas* Pet., at 8-10.

6. Prosecutors can develop reliable intelligence information by debriefing cooperating defendants

As a final matter, Judge Wilkinson opined that defendants' rights to speedy trial and immediate assistance of counsel could "hinder the government's need to gather information" because "effective . . . interrogation[] typically takes time" during which the suspect must be held incommunicado. Pet. App. 213a. However, this argument ignores the reliable intelligence that has been derived from cooperating defendants in terrorism cases. In a webpage devoted to "Waging the War on Terror," the Department of Justice touts its ability to gather information "by leveraging criminal charges and long prison sentences." U.S. Dep't of Justice, Website, *Waging the War on Terror*.[12] According to the site, cooperating defendants "have provided critical intelligence about al-Qaida and other terrorist groups, safehouses, training camps, recruitment, and tactics in the United States, and the operations of those terrorists who mean to do Americans harm." *Ibid.* Furthermore, as those familiar with the criminal justice system are well aware, prosecutors must corroborate the infor-

[12] http://www.lifeandliberty.gov/subs/a_terr.htm

mation gained from cooperating defendants so that they can withstand cross-examination.

One example of a successful cooperator is Yahya Goba, one of six defendants indicted in the Lackawanna Six case. Goba agreed to cooperate with the government and pled guilty in March 2003 to providing material support to al Qaeda in connection with his attendance at an al Qaeda training camp in Afghanistan. See Plea Agreement, *United States v. Goba*, No. 02-cr-214 ("*Goba* Proceedings") (W.D.N.Y. Mar. 25, 2003) (Dkt. No. 113); Change of Plea, *Goba* Proceedings (Mar. 25, 2003) (Dkt. No. 116). He later testified as a government witness at the trials of Mohammed al-Moayad and Jose Padilla, and in other cases as well. See *al-Moayad*, 545 F.3d, at 156-57; Decision and Order as to Yahya Goba, *Goba* Proceedings (Dec. 14, 2007) (Dkt. No. 288); see also Plea Agreement, *United States* v. *Qureshi*, No. 04-cr-60057 (W.D. La. Feb. 11, 2005) (Dkt. No. 31) & DOJ Counterterrorism White Paper, at 30 (discussing Mohammad Salman Farooq Qureshi's proffer about al Qaeda member Wadih el-Hage and an organization that may have assisted in financing the embassy bombings in Kenya and Tanzania).

C. The Government Will Very Likely Be Able to Prosecute Petitioner After Releasing Him From Military Custody

The original criminal charges against petitioner were dismissed with prejudice at the government's request. See Order of Dismissal & Tr. of Proceedings at 10-16, *al-Marri III* Proceedings (June 23, 2003) (Dkt. Nos. 16, 17). Nevertheless, a review of the allegations against petitioner suggests that the govern-

ment could probably bring new charges against him under several different statutes.

First, the allegations, if backed by evidence, appear to support a charge of providing material support to a terrorist organization in violation of 18 U.S.C. §§ 2339A and/or 2339B. Between 1996 and 1998, petitioner is alleged to have trained at al Qaeda camps in Afghanistan where, among other things, he allegedly received training in the use of poisons. Resp. App. 6a. In the summer of 2001, petitioner allegedly volunteered to carry out a terrorist attack on behalf of al Qaeda. *Id.*, at 7a. According to the Rapp Declaration, al-Qaeda "instructed al-Marri to explore possibilities for hacking into the main-frame computers of banks with the objective of wreaking havoc on U.S. banking records and thus damaging the country's economy." *Id.*, at 8a. Petitioner then allegedly moved to the United States. *Id.*, at 5a. When his laptop computer was later seized, it was, according to the government's allegations, found to contain "numerous computer programs typically used by computer hackers," suggesting that petitioner had undertaken to do as al Qaeda instructed. *Id.*, at 13a. Furthermore, petitioner's alleged computer contents indicated that he had researched the use of chemical weapons in contemplation of a terrorist attack, research that was "consistent with the documented interests of al Qaeda" and thus may have been carried out on al Qaeda's behalf. *Id.*, at 9a-10a.

Evidence of petitioner's contacts with other al Qaeda figures, and his surreptitious conduct, could further bolster a material support prosecution. For example, after he entered the United States, petitioner allegedly called a telephone number in the

United Arab Emirates (UAE) that was used by Mustafa Ahmed al-Hawsawi, an alleged al Qaeda financier and co-conspirator of Zacarias Moussaoui's. *Id.*, at 4a-5a, 8a. The UAE number was also used on a Federal Express package sent by 9/11 hijacker Mohammed Atta and in connection with other alleged al Qaeda figures. See Ill. Compl., at 8. Further, petitioner allegedly met with al-Hawsawi in Dubai in August 2001 and received funds from him, including the funds used to purchase the seized laptop. Resp. App. 8a.

A material support prosecution could further rely on the allegations of petitioner's surreptitious behavior. For example, petitioner allegedly used an alias, "Abdullakareem A. Almuslam," to stay at a hotel which was used in turn as the home address for this alias in connection with the opening of fraudulent bank accounts for a company, "AAA Carpet." *Id.*, at 17a.[13] Further, petitioner allegedly admitted to creating three email accounts under false names. Each of these accounts contained a draft message with a coded version of petitioner's telephone number and addressed to an email account associated with Khalid Shaykh Muhammed. *Id.*, at 11a-12a. There is also evidence which, if proven, would show that petitioner surreptitiously entered the United States in 2000 and then lied about it. See Ill. Compl., at 16-17.

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[13] Two witnesses who were shown photographic arrays have allegedly identified petitioner as the individual known as Abdullakareem Almuslam. Resp. App 17a (first witness); Ill. Compl. at 14 (second witness).

If proven, petitioner's travel on behalf of al Qaeda, his research into available methods for carrying out a terrorist attack, and his volunteering to work on al Qaeda's behalf in the first place would likely constitute material support. See, *e.g.*, Judgment, *United States* v. *Faris*, No. 03-cr-189 (E.D. Va. Apr. 30, 2003) (Dkt. No. 34) (judgment entered where defendant charged with material support and plea agreement entered after defendant scouted Brooklyn Bridge for possible terrorist attack). Furthermore, petitioner's alleged agreement with members of al Qaeda that he would assist them and the al Qaeda organization in carrying out a terrorist attack would likely support a charge of conspiracy to provide material support under the same statutes. See, *e.g.*, Superseding Information & Plea Agreements, *Ahmed* Proceedings (Jan. 15, 2009) (Dkt. Nos. 129, 132, 133) & Ahmed Press Release (defendants agreed to travel overseas to kill U.S. soldiers).[14] Because the material support statutes have an eight-year limitations period (see 18 U.S.C. § 3286(a)), the government need

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[14] Conspiracy to provide material support to a designated terrorist organization was prohibited by § 2339B at the time of the alleged agreement. Conspiracy to provide material support to terrorists was prohibited by 18 U.S.C. § 371 at the time of the alleged agreement; the conspiracy was evidently still ongoing after October 26, 2001, when Congress extended the maximum sentence and statute of limitations applicable to such conspiracies by adding a specific conspiracy provision to § 2339A. *See* USA Patriot Act, Pub. L. No. 107-56, § 811(f), 115 Stat. 272, 381 (2001).

only charge petitioner before the summer of 2009 to avoid a limitations problem.[15]

Second, the allegations suggest that the government could charge petitioner with mail fraud or attempted mail fraud under 18 U.S.C. §§ 1341 and 1349. Petitioner's alleged wrongdoing will likely have caused credit card issuers to seek payment from account holders by sending statements containing the wrongful charges through the mails. Furthermore, a grand jury found that petitioner applied for several bank accounts using a false name and a false mailing address at which he would "receive documents related to the bank accounts he intended to open." Indictment at 1, *al-Marri III* Proceedings (May 22, 2003). Petitioner's alleged use of the mail was seemingly intended to further his fraudulent scheme to make charges against credit card numbers, and so would support a charge of mail fraud. See Ill. Compl., at 14-15. Mail fraud has a 10-year limitations period where the fraud affects a financial institution. See 18 U.S.C. § 3293(2). In this case, then, the statute of limitations would extend at a minimum into 2011.

Finally, the allegations would likely sustain a charge of wire fraud under 18 U.S.C. § 1343, which similarly has a 10-year limitations period where the fraud affects a financial institution. Petitioner allegedly opened an account with a credit card processor,

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[15] In addition, the government may toll the statute for an additional three years if it seeks evidence from abroad (see 18 U.S.C. § 3292(a)(1)), as it could presumably do in petitioner's case. See Resp. App. 7a (petitioner allegedly volunteered for terrorist mission while in UAE).

through which he attempted to make charges against several of the stolen credit card numbers the government found when it seized his computer. See Ill. Compl., at 14-15. Transmitting the fraudulent charges to the credit card processor via wire could likely support a charge of wire fraud.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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JANUARY 2009